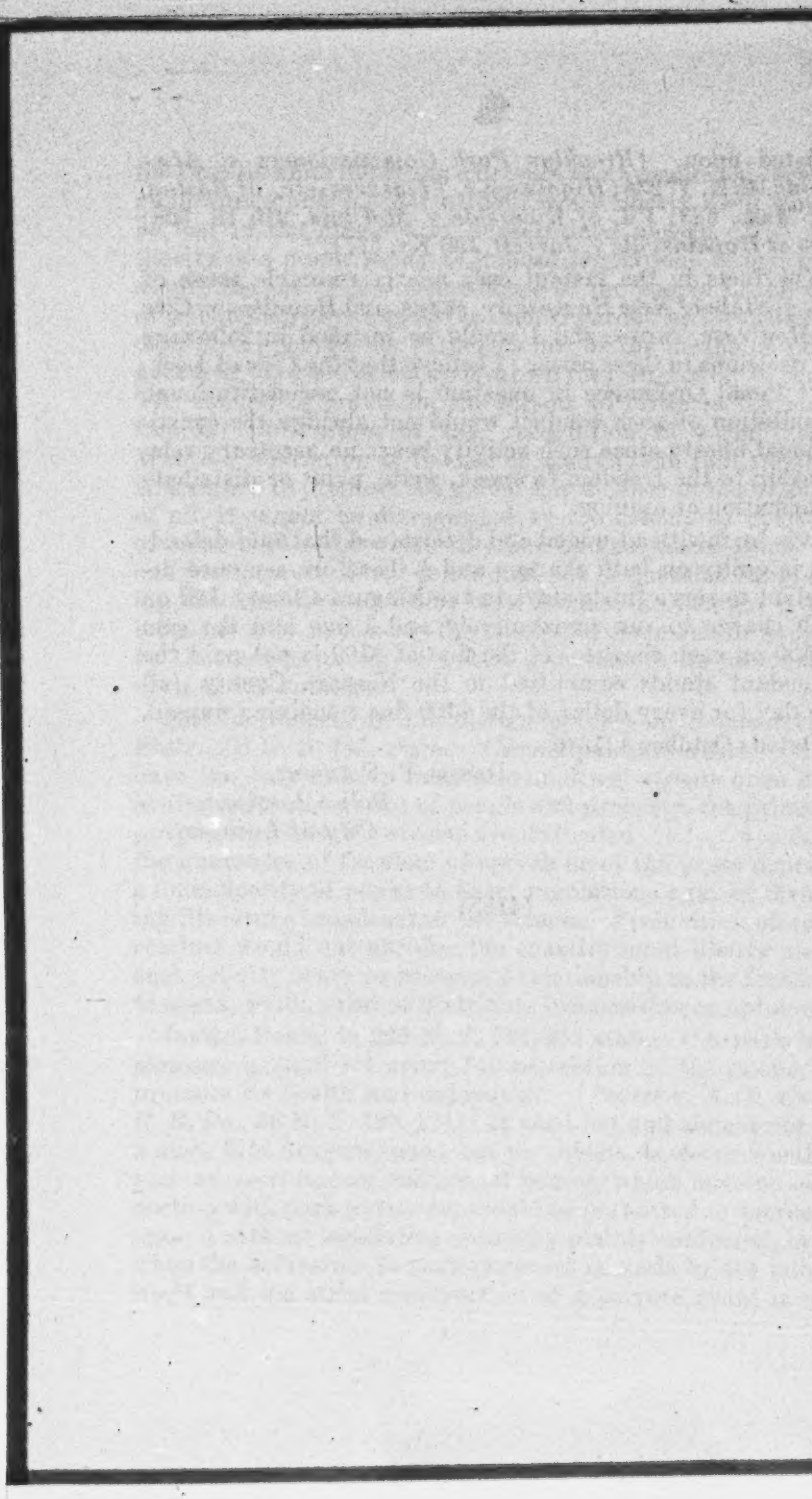

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# Supreme Court of the United States

OCTOBER TERM 1947

## No. 504

SAMUEL SAIA, *Appellant*

*v.*

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF NEW YORK

# BRIEF
# FOR APPELLANT

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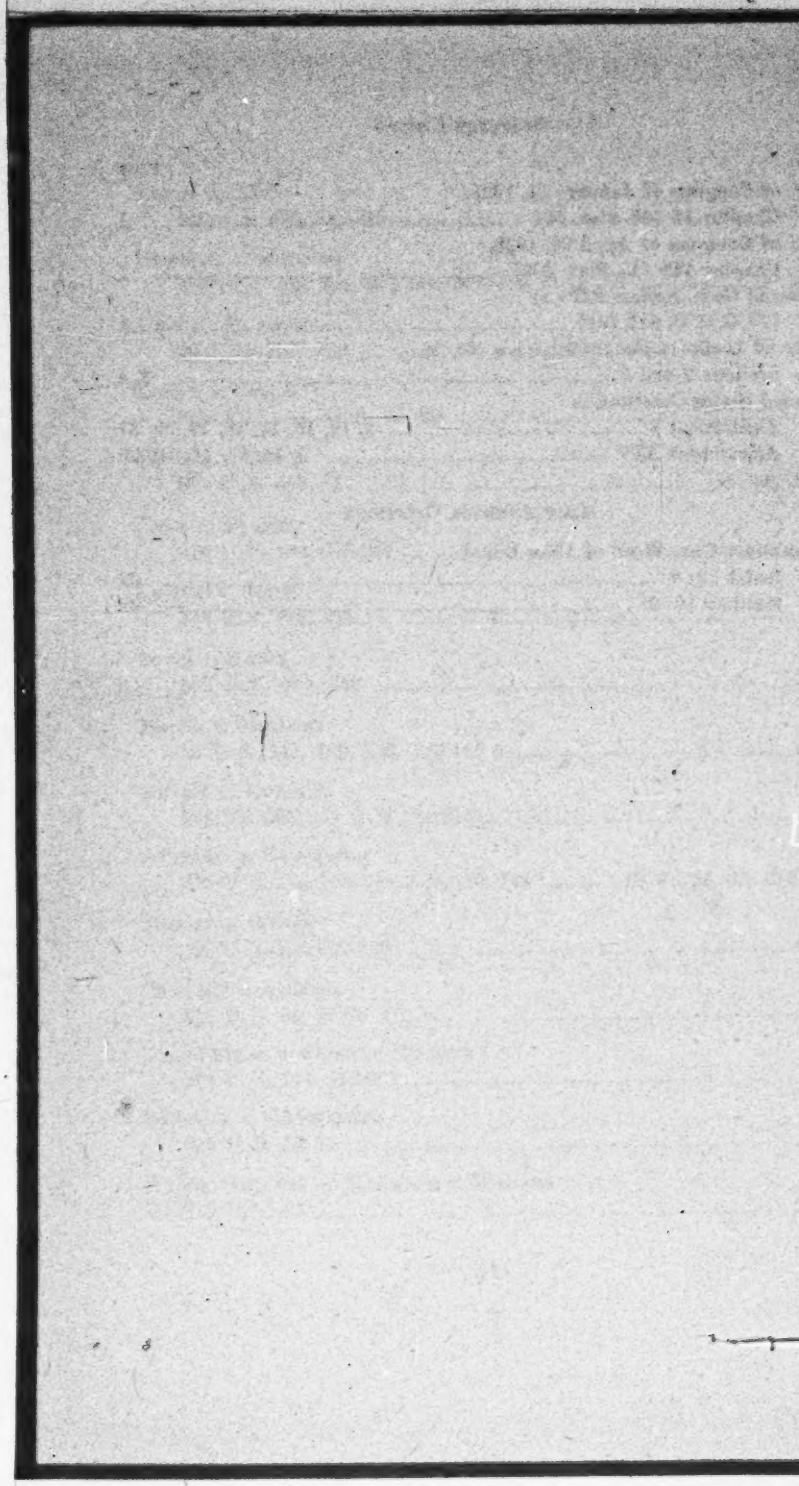

# Supreme Court of the United States

OCTOBER TERM 1947

**No. 504**

SAMUEL SAIA, *Appellant*

*v.*

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

# BRIEF FOR APPELLANT

## Jurisdiction

The jurisdiction of this court is invoked under Section 237 (a) of the Judicial Code or 28 U. S. C. 344 (a).

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. These four cases present a state of facts within the jurisdiction of this Court.

## Opinions of Courts Below

The New York Court of Appeals did not write an opinion. The decision of the Court of Appeals is not yet reported. It is set out in the record. [265-266][1] The County Court of Niagara County wrote no opinion. The decision of the County Court appears in the printed record. [257] The Police Court of Lockport wrote two separate opinions. The first opinion appears in the record. [22-23] The second opinion also appears in the record, in which the law relied upon is analyzed. [33-39]

## Statement of Case

### Questions Presented

1. Does the ordinance, which forbids the use of sound devices upon the streets or in the public parks of the City of Lockport, as construed and applied in this case, prohibit and abridge appellant's exercise of freedoms of speech, assembly and worship of ALMIGHTY GOD, contrary to the First and Fourteenth Amendments to the United States Constitution?

2. Does the ordinance, which confers arbitrary and discriminatory power upon the chief of police of the City of Lockport to permit the use of sound amplifying devices under some circumstances, censor liberty and abridge appellant's freedoms of speech, assembly and worship of ALMIGHTY GOD, contrary to the First and Fourteenth Amendments to the United States Constitution?

3. Is the ordinance, on its face and as construed and applied, unconstitutional because it abridges appellant's freedoms of speech, assembly and worship of ALMIGHTY GOD, contrary to the First and Fourteenth Amendments to the United States Constitution?

[1] All figures appearing in brackets herein denote pages of the printed record.

4. Is it within the police power of the City of Lockport to prohibit completely the use by speakers in its public parks of sound amplifying devices that are not inherently dangerous to the safety, health, morals, peace, general welfare or property of the city's inhabitants?

**Legislation Drawn in Question**

These cases draw into question the validity of state legislation, to wit, Penal Ordinance No. 38 of the City of Lockport, reading as follows:

> Section 2. Radio devices, etc. It shall be unlawful for any person to maintain and operate in any building, or any premises or on any automobile, motor truck or other motor vehicle, any radio device, mechanical device, or loud speaker or any device of any kind whereby the sound therefrom is cast directly upon the streets and public places and where such device is maintained for advertising purposes or for the purpose of attracting the attention of the passing public, or which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of the travelers upon any street or public places or of persons in neighboring premises.
>
> Section 3. Exception. Public dissemination, through radio, loud speaker of items or news and matters of public concern and athletic activities shall not be deemed a violation of this section provided that the same be done under permission from the Chief of Police. [16, 22, 28, 34, 103, 109]

### Timeliness

The judgment of the New York Court of Appeals was made and entered on November 14, 1947. [265-266] The petition for appeal to this Court was duly and timely presented. [266-269] On December 8, 1947, an order was made and entered allowing appeal to this Court. [269-270] On February 2, 1948, this Court noted probable jurisdiction. [272]

### Form and History of Action

These criminal proceedings were instituted by informations in the Police Court of the City of Lockport, New York. Each of the four informations charged that Samuel Saia violated the above-named ordinance on September 8, September 15 and September 22, 1946. [19-21, 31-33] Each information is identical with respect to the alleged violation. In each information it is charged that Samuel Saia "did unlawfully, wrongfully, wilfully, feloniously and against the statute in such case made and provided violate Lockport City Penal Ordinance No. 38: . . . in that said defendant did maintain and operate on an automobile a radio device and loud speaker whereby the sound therefrom was cast directly upon the streets and public places in said City of Lockport, N. Y., to wit: Outwater Park. Such radio device was maintained for the purpose of attracting the attention of the passing public and the people in said park and the sounds coming therefrom could be heard to the annoyance or inconvenience of travelers upon the street and the users of said public park and neighboring premises. ¶ And that said defendant did violate said ordinance in that he failed to obtain a permit or permission from the Chief of Police." [2]

The first two informations were called for trial and heard together on Tuesday, September 10, 1946, in the Po-

[2] The two later informations differ slightly from the two original informations, in that "subdivision 3" of the ordinance is specified, as well as "subdivision 2".

lice Court of the City of Lockport. [41] Upon the call of the cases the appellant pleaded not guilty. [41] He announced ready for trial. Not being represented by an attorney, appellant was permitted by the court to have a friend assist him by questioning him during the trial of the two informations. [41-42] At the close of the People's case a motion to dismiss both informations and render a judgment of acquittal was filed and presented. [69] On denial of the motion exception was taken and allowed. [70] At the close of all the evidence another motion for dismissal and judgment of acquittal was made and filed. [102] The court reserved decision until the following day. On September 11, 1946, the court overruled the motion and found appellant guilty as charged in each information. [103-105] Saia was fined $15 on each charge and on default in payment of such fine he was sentenced to the Niagara County Jail for thirty days. [105] He duly appealed, in the manner required by law, on September 13, 1946. [105]

The second two informations were called for trial on September 28, 1946. [107] On that day they were heard together in the Police Court of the City of Lockport. [108] Upon the call of the cases the appellant pleaded not guilty and announced ready for trial. [107] Upon the call of these two informations for trial appellant was represented by counsel. [107] At the close of the People's case a motion to dismiss both informations and render a judgment of acquittal was filed and presented. [203-204] At the close of all the evidence another motion for dismissal and judgment of acquittal was made and filed. [253-256] That motion was denied and the court reserved decision in the cases until Friday, October 4, 1946. [256] On that day the court found the appellant guilty as charged in each information and sentenced him to serve thirty days under each information in the Niagara County Jail, and in addition thereto fined him $50 on each charge, ordering him committed to jail upon

default in payment of said fine, to be served at the rate of one day for every dollar of the fines unpaid. [38-40]

The convictions in these four cases were duly appealed to the County Court. [14, 26] Upon the appeal to the County Court the judgment of the Police Court in each case was affirmed. [258-259] Thereafter application was duly made for leave to appeal to the Court of Appeals of the State of New York. [7-11] Leave to appeal was granted. [4-5] Notice of appeal was duly served and filed. [5-6] After argument, submission and deliberation the Court of Appeals affirmed on November 13, 1947. [265-266]

On December 8, 1947, appellant duly presented his petition for appeal, statement, assignments of error and prayer for reversal to the court below. [266-269] The chief judge of the Court of Appeals of New York allowed appeal to this Court on December 8, 1947. [269-270] On February 2, 1948, this Court noted probable jurisdiction. [272]

## Facts

Outwater Park is a public park situated in the City of Lockport, New York. [110] The park was granted to the city for use by the public by deed duly recorded. [111-112] The park is large, comprising about 28 acres. [121] It was a 1600-foot frontage on one of the public streets of Lockport, and a depth ranging from 250 to 400 feet. [111] The park is beautifully landscaped and studded with trees. [44, 47-48, 64, 65, 121] Various facilities are situated in the park, which is primarily devoted to recreation and other public purposes. [64-65, 110, 116, 122] It has a wading pool and playground for children. [117, 364] Part of the park is equipped for picnic parties, having tables and benches and stationary fireplaces. [110, 116] In addition thereto there is a baseball diamond and places dedicated for horseshoe pitching. [122] Also there are lawn bowling courts. [122] Throughout the park are suitable benches for rest, recrea-

tion and assembly of people who might use the park for public purposes. [110, 121] Adjacent to the park is a baseball field and stadium surrounded by a fence six feet high. [64, 65, 126] The park and ball field and stadium are separated by a two-lane park-divided highway. [64, 110]

Samuel Saia, the appellant, is a resident of Buffalo, New York. [70, 232] During each week he is employed by the City of Buffalo. [232] Being one of Jehovah's witnesses, in addition to his secular work, he preaches the gospel as an ordained minister of the Watch Tower Bible & Tract Society. [72, 228-229] Walter M. Hammond is also one of Jehovah's witnesses, being in charge of the congregation located at Lockport. [80, 214-215] Associated with Hammond and others of Jehovah's witnesses in Lockport is Walter A. Reid, another of Jehovah's witnesses, an ordained minister. [223, 239]

Jehovah's witnesses in Lockport are engaged in preaching the gospel of God's kingdom as did Christ Jesus and His apostles. [244-245] During the summer of 1946 Hammond, Reid, and others of Jehovah's witnesses secured from the chief of police of the City of Lockport a permit for use of sound equipment in connection with a series of public meetings to be held in Outwater Park on four consecutive Sundays. [67, 68, 94, 217] Each time the sound equipment was operated for the purpose of amplifying the voice of the speaker. [68, 94, 226] The appellant, Saia, owned an automobile that had sound-amplifying equipment attached thereto, consisting of microphone and amplifying apparatus together with incidental equipment. [53, 55, 70, 232] He used that equipment and operated it during this series of meetings in cooperation with the speakers on each occasion. [68, 81] The permit for use of the sound equipment in connection with the public meetings expired at the termination of the series of four meetings first held in the park by Jehovah's witnesses. [81, 227]

On or about July 24, 1946, Nelson Howell and Roy Mort, Jehovah's witnesses, planning for a second series of four meetings in the park, went to the chief of police in Lockport and attempted to secure a permit for Saia to use his sound equipment in connection with the proposed second series of four public meetings. [220, 226] They requested a permit for use of the sound equipment to amplify the voice of the speaker on Sundays, September 1, 8, 15 and 22, 1946. [79, 220] The chief of police denied the requested permission for Saia to use the sound equipment in the park for this series of meetings, stating that objections had been made to the holding of the meetings in the park by Jehovah's witnesses. [79, 227] The chief of police refused to renew the previous permit that had been granted for use of the sound equipment incidental to the first series of public meetings held in the park. [227] The chief of police referred Hammond and Mort to the Mayor. [226] The mayor likewise refused to grant the permit, as did the park superintendent. [226]

On Sunday, September 1, 1946, Hammond, Mort, Reid, Saia, and others of Jehovah's witnesses proceeded to hold the first meeting of their second series of meetings in Outwater Park. [42, 86, 90, 96] This group of Jehovah's witnesses, together with several other persons, assembled in Outwater Park to hear the speaker, one of Jehovah's witnesses. [90] The appellant Saia brought along his automobile with sound equipment for the use of the speaker on such occasion. [70] Saia set up the sound equipment at the place of assembly, in the automobile, which was about 25 feet away from the speaker. [53, 82, 83, 87] The microphone was placed before the speaker. [78] The amplifying horns, on top of the automobile, were used for the purpose of amplifying the voice of the speaker. [54, 70] The speech began. [51, 78] The topic of the speech was a Bible subject; in fact, it was a discourse or sermon upon spiritual matters. [48, 51, 54]

After the speech started, while the speaker's voice was going through the amplifier to the audience assembled in the park to hear the talk, a special officer assigned to duty in the park approached Saia and ordered him to discontinue use of the sound equipment. [43, 44, 83, 84] Saia informed him that he did not have a permit since the chief of police had refused to grant one. [42-43, 87] This was almost immediately after the talk began. [92] Upon Saia's refusal to discontinue, the special officer left with a warning that he was going to call the police. [44] Within three to five minutes thereafter Harry J. Wolfe and Francis J. McLoughlin, police officers, appeared. [45] They demanded that the use of the sound device be discontinued. [84, 88] Saia and others of Jehovah's witnesses remonstrated with the officers and attempted to show them booklets and decisions containing legal arguments in favor of the right of Jehovah's witnesses to protection in the exercise of their rights of freedom of speech, press and worship. [72-73, 101] Officer Wolfe stated that he 'didn't have a damn bit of use for what had been written about the Constitution protecting the rights of Jehovah's witnesses, nor the decisions of the Supreme Court of the United States.' [78, 84-85, 100] Wolfe immediately and forcibly cut off the sound equipment and roughly threw the amplifier and other equipment into the car. Officer McLoughlin placed Saia under arrest and charged him with a violation of Section 2 of the ordinance. [20, 55]

On Sunday, September 8, 1946, Hammond, Mort, Reid, and others of Jehovah's witnesses and people invited to attend the meeting, again assembled in Outwater Park to hear the second talk to be delivered in the second series of four public meetings in the park. [61] Saia came along, bringing his car and sound equipment. [60] These he located in the park. [60] In front of the speaker, Saia set up the microphone, which was attached to the amplifying devices on top of his car parked about 25 or 30 feet away. [60-61] In the near-by ball park, about a thousand feet from

the place where Saia had the sound equipment set up for the use of the small assembly in the park, the Lutherans were holding a big public gathering. [63-64] In the ball park the Lutherans were using sound equipment which could be heard by persons in the park. [63] The stadium in the ball park where the Lutherans were holding their meeting was surrounded by a high six-foot fence. [63] Like the talk that was attempted to be given over the Saia sound equipment on the previous Sunday, the talk on Sunday, September 8, related to an explanation of Bible prophecies, showing the establishment of God's kingdom. [65, 67, 83]

Fifteen minutes after the Bible discourse began Paul A. Morehouse and Joseph G. Chausse, policemen of the City of Lockport, approached Saia and asked him whether he had a permit for the operation of the sound equipment. [61, 63-64] Having none, because of the refusal of the chief of police to grant the previous request made in his behalf, Saia informed the officers that he had none. [61] They ordered him to shut off the sound equipment: [61, 64] Saia attempted to talk to them and to show that the ordinance did not apply, because he was a minister and the speaker also was a minister. [61] Saia and others showed the officers the law and Supreme Court decisions. [61] Chausse, refusing to recognize the right of Saia to operate the equipment in the absence of a permit, stopped the operation of the sound equipment. [62] The officers distinctly heard the speaking through the sound device while 25 feet away. [61, 62] When the equipment was cut off the sound device in operation in the stadium across the road from the park, where the Lutherans had gathered, could be heard. [62, 64, 65] The chief of police had granted a permit to the Lutherans for use of the sound equipment in the ball park. [63] The officers testified that the sound of voices from the Saia device could be heard only about 50 feet or 100 feet away as they approached the speaker serviced by the device. [64] Appellant, not having a permit and having oper-

ated the sound equipment without one, was thereupon arrested and charged with a violation of Section 2 of the ordinance in question. [21, 62]

On Sunday, September 15, the same group of Jehovah's witnesses and other persons assembled in Outwater Park for the third of their series of public meetings. [189] Saia again appeared with his sound equipment on his automobile. The microphone was set up in front of the speaker as on previous occasions. [189] The amplifying apparatus was operated as on former occasions. [232] The talk delivered to the audience on this occasion was entitled "World's Woes—Why Permitted?" [231] Shortly after the speaker began delivery of his talk to the assembly in the park over the Saia sound device, John E. Hull, police officer of the City of Lockport, approached the park, stopped about 500 or 600 feet away from the amplifying device being operated by Saia. [196] Then Hull went on to the Saia car, on top of which were the amplifying devices that were then in operation and use by the speaker. [197] As Hull got closer, the speaking could be heard very distinctly. [200] He asked Saia whether he had a permit to operate the sound device. Saia informed Hull that he had no permit; so the officer pulled the connecting cord between the amplifying and the microphone and stopped operation of the device. [199] He then charged Saia with violation of Section 2 and 3 of the ordinance and arrested him. [31, 190, 200]

On Sunday, September 22, 1946, the fourth and last of the series of public meetings was held by Jehovah's witnesses and a number of invited persons appeared at the park to hear the speaker deliver a talk on the subject "Christians in the Crucible." [172, 234] Also on this occasion Saia was present to provide the speaker with the use of his sound equipment. [230-231] It was set up as on previous occasions for the use of the speaker. [231] It was in operation when, about 20 minutes after the talk began, George Gardner, Sr., a policeman of the City of Lockport, appeared.

[171, 207] He had come to the park and stopped about 200 feet from where the Saia loudspeaker was located. [171, 181] He went over to where Saia was seated in his car equipped with the amplifiers. [171] He asked Saia whether he had a permit. [173] Saia produced his credentials of ordination issued by the Watch Tower Bible & Tract Society. [173, 229] Such, being not considered as a permit by Gardner and his companion officer, Sheehan, was not recognized. [173, 180] Gardner requested Saia to shut off the sound equipment. [173, 181] Saia refused. Gardner cut off the sound equipment and placed Saia under arrest because he did not have a permit required by the ordinance. [174, 181] Thereupon he charged Saia with violation of Sections 2 and 3 of the ordinance. [33]

Testimony of the complaining witnesses varied as to the distance that the talk over the loud speaker could be heard on each occasion. [61, 62, 64, 130, 137, 141, 145, 155, 163, 175, 187, 196, 197] The testimony was that it could be heard from 25 to 500 feet away. [62, 196] However, a majority of the witnesses agreed that the speech over the sound equipment could not be heard intelligibly beyond 250 feet. [175, 177] The sound technician, Joseph Stralker, said speech over the device could be heard intelligibly at 300 feet. [248] He stated that 500 feet audibility was not intelligible. [248] He stated that speech over the device 600 feet distant was hardly audible. [252]

All of the complaining witnesses testified that the meetings were orderly and that the subject matter of the speech was not offensive to them. [127, 133, 138-139, 165, 166, 177, 185, 191, 201] They all admitted that the talks were upon "religious matters". [48, 54, 67, 134, 147, 160, 176, 185] Practically every one of the complaining witnesses admitted having heard church bells ring on Sunday and that they were not offended at the ringing of church bells. [127, 139, 148, 163, 177, 185, 193, 212] In fact, all admitted that the operation of the sound device was not louder than church

bells. [127, 144, 148, 163, 177, 185, 193, 212] Indeed, they admitted that the sound device was not nearly as loud as church bells while ringing on Sunday. [177] None of the witnesses testified that he was prevented from enjoying the facilities of the park by reason of the use of the sound equipment. [132, 138, 139, 141, 177, 147] In fact, many of the complaining witnesses testified that they were not even annoyed by the sound equipment. [132, 133, 138, 142, 147, 177, 185, 202] Some stated that they had no objection to the use of the sound equipment in the park. [161, 186]

One of the complaining witnesses testified that the loudspeakers in the ball park, which are much louder than the sound device used by appellant, did not annoy, even as did not the church bells and factory whistles that are much louder than the sound device used by the appellant. [126-127]

The undisputed evidence showed that Samuel Saia, Walter Reid, Walter M. Hammond, Roy Mort, and Nelson Howell are duly ordained ministers of the gospel. [72, 76, 87, 214, 219, 226, 229, 233, 239] Each testified that he was authorized to represent the Watch Tower Bible & Tract Society, the legal governing body of Jehovah's witnesses. [72, 76-77, 84, 87, 215, 229, 233] Each testified that he considered it to be his bounden duty to ALMIGHTY GOD as a minister of the gospel to preach publicly in the park and to make use of the sound equipment in order to sufficiently amplify the voice of the public speaker so that the message being delivered to the assembled audience could be heard and understood by all in attendance. [70, 75, 77, 82, 223, 224, 225, 234, 241] The appellant and others of Jehovah's witnesses did not desire to flout the law, according to their testimony; but since the mayor had denied the permit to use the sound equipment they regarded his action, as well as the ordinance prohibiting use of the sound equipment, as being contrary to the law of ALMIGHTY GOD. [89, 91, 97, 221, 222] They testified that they believed the law to be

unconstitutional as construed and applied to them. [75, 93, 221, 222] Therefore they, like the apostles of Christ Jesus, chose "to obey God rather than men"[3] and persisted in giving the lecture in the park and simultaneously therewith using the sound equipment. [82, 89, 97, 244]

The undisputed evidence shows that the denial of the permit was not for the purpose of regulation of the use of sound devices in the park. [62, 63, 68, 226, 227]

The evidence shows that the permit was denied for the purpose of censorship, because some persons had objected to Jehovah's witnesses, holding meetings in the park and for that reason the chief of police of the City of Lockport had denied the requested permission for use of the sound equipment in connection with the second series of four lectures to be given at the public meetings in the park during September 1946. [227]

### How Issues Raised

In the Police Court of Lockport the appellant, by motions to dismiss, filed at the close of the evidence, contending that the ordinance in question, as construed and applied to authorize his conviction for the use of sound equipment in connection with the delivery of Bible sermons by a minister of the gospel in a public park, was unconstitutional and void in that it abridged appellant's right to freedom of conscience, freedoms of speech, assembly and worship of ALMIGHTY GOD, contrary to the First and Fourteenth Amendments to the United States Constitution. [69, 102, 203-204, 253-256]

The judge of the Police Court specifically passed upon the constitutional questions raised by the appellant. The motions were denied. [70, 102-105, 204, 256] The judge of the Police Court wrote a memorandum opinion containing his reasons for holding the ordinance constitutional and

[3] Acts 5:29.

denying the motions made by appellant. [22-23, 33-39, 103-105]

In his affidavit on appeal to the County Court of Niagara County, the appellant attacked the ordinance on the ground that, as it had been construed and applied by the trial court, it abridged his rights of freedom of speech, assembly and worship of ALMIGHTY GOD. [17, 29] These were overruled by the County Court. [257] The County Court affirmed the judgments of conviction by the Police Court of the City of Lockport. [258-259]

In his application, which was duly made to a judge of the New York Court of Appeals, the appellant complained of the judgment of affirmance by the County Court on the grounds that the ordinance, as construed and applied, abridged his rights of freedom of speech, assembly and of worship of ALMIGHTY GOD, contrary to the First and Fourteenth Amendments to the United States Constitution. [10] On these grounds a certificate allowing appeal was granted. [4-5]

The contentions of the appellant that the ordinance was unconstitutional as construed and applied were overruled by the New York Court of Appeals and the judgments affirmed. [265-266]

The New York Court of Appeals certified that the constitutional questions were duly raised and considered. [289]

The petition for appeal to this Court, duly filed in the New York Court of Appeals, attacked the constitutionality of the ordinance involved for each and every one of the reasons advanced in the courts below and as hereinbefore set out. [267-268]

In his statement of points relied upon, appearing in the record in these cases, the appellant alleged that the ordinance is unconstitutional as construed and applied because it abridges appellant's rights of freedom of speech, assembly and worship of ALMIGHTY GOD, contrary to the First and Fourteenth Amendments to the Constitution. [273-274]

## Summary of Argument

**The ordinance, on its face and as construed and applied, deprives appellant of his rights to freedom of speech, freedom to communicate information and opinion to others, freedom of assembly and freedom to worship Almighty God, contrary to the First and Fourteenth Amendments to the United States Constitution.**

### A

**Public parks are the natural and proper places for assembly and communication of ideas through speech. In fact this is the only way of reaching millions of people who are not accessible by house-to-house visitation.**

### B

**The right to speak carries the right to be heard. The right to be heard implies the right to use auxiliary devices to reach the hearers in the exercise of speech at assemblies and in public places.**

### C

**Sound amplifying devices are a necessary adjunct to modern-day effective public speaking at assemblies.**

D

Freedom to be heard is as vital to freedom of speech as is freedom to circulate to freedom of press.

E

Restricting the abridgment to the use of sound devices may not be justified on the ground that the right of free speech in the park without such auxiliary remains unimpaired.

F

The specious argument leading to a factitious conclusion that the use of sound devices results in forced audience abuse of free speech should be rejected.

G

The ordinance does not regulate as to time, place and manner the use of sound devices ancillary to free speech and is therefore not within the police power of the City of Lockport.

H

There is no showing that the use of the sound device in this case was an abuse of the right of free speech so as to present a clear and present danger to interests that the City of Lockport had the right to protect.

I

**The ordinance is presumptively unconstitutional because the State has failed to discharge the burden of proof imposed upon it in civil rights cases in prosecutions where the First Amendment is involved.**

J

**The police power of the State authorizing the prohibition and censorship of commercial pursuits and activities does not enter here.**

K

**The ordinance is void because, on its face and as construed and applied, it prohibits the exercise of freedoms of speech, assembly and worship of Almighty God.**

L

**The ordinance is void because, on its face and as construed and applied, it licenses and censors the exercise of freedoms of speech, assembly and worship of Almighty God.**

M

**The decisions sustaining anti-noise ordinances, as applied to sound devices used in connection with public speech at assemblies, are not sound.**

## Argument

**The ordinance, on its face and as construed and applied, deprives appellant of his rights to freedom of speech, freedom to communicate information and opinion to others, freedom of assembly and freedom to worship Almighty God, contrary to the First and Fourteenth Amendments to the United States Constitution.**

### A

**Public parks are the natural and proper places for assembly and communication of ideas through speech. In fact this is the only way of reaching millions of people who are not accessible by house-to-house visitation.**

Public parks devoted to recreation and the common use of the public, as is Outwater Park, have from time immemorial been used as places of assembly, upon the hustings and in the commons, as far back as the mind of free people can remember. As far back as the memory of free people can extend, the public parks have been used as places for making public speeches upon commercial, political and religious questions. Since the days of the Lord Christ Jesus and His apostles Christian ministers whose lives are devoted to the evangelizing of the people have made use of concourses, market places, hustings and public parks; in fact, any place where a crowd could be gathered and talked to, as a means of preaching the gospel. These forums cannot be denied to persons by censorship laws or prohibitory laws. *Jamison* v. *Texas,* 318 U. S. 413; *Schneider* v. *New Jersey,* 308 U. S. 147; *Hague* v. *C. I. O.,* 307 U. S. 496.

There is a very practical reason why persons use such public places for these purposes. Today millions of people do not remain at home during such hours as are ordinarily devoted to house-to-house calls. The only possible way to

reach those millions of people, under favorable weather conditions, is by going publicly upon the streets and into the parks and other public places.

## B

**The right to speak carries the right to be heard. The right to be heard implies the right to use auxiliary devices to reach the hearers in the exercise of speech at assemblies and in public places.**

If one has the right to use of the parks and streets, to assemble in public meeting, to speak to those assembled and to communicate information and opinion, then certainly one has the right to speak in such a manner as to be heard whether it be on the city streets, at public parks or anywhere else. Just as the right of free press includes the right to distribute, so freedom of speech includes the right to be heard. Any statute or ordinance which seeks to prevent the use of a sound apparatus, in effect, prohibits one from being heard, and, for all practical purposes, enforces a ban on the rights of assemblage and freedom of speech and freedom to communicate information and opinion to others.

## C

**Sound amplifying devices are a necessary adjunct to modern-day effective public speaking at assemblies.**

The Court has knowledge of the changes to which municipalities have been subjected by reason of the industrialization of the nation and the progress of science and civilization. These changing times have brought with them many things which of necessity have disturbed the quiet of the thoroughfares and public places. Today, one exercising the right of assemblage and of free speech on a city thoroughfare or in a public place must overcome the handicaps of

noises generated by mechanical traffic, industries and other persons and instrumentalities using those places. It has, therefore, become a common practice, in the exercise of freedom of speech, of communication and of assemblage, to use mechanical means to amplify the voice.

In cities during the recent war emergency, both the Army and Navy and the United States Civil Service employed loud speakers and sound amplifiers attached to motor vehicles on the city streets to effectively reach people and to make known to the public their need for recruits for the armed forces and for various important war jobs. The police departments of some of the cities have such a sound system permanently attached to their motor vehicles which are used on the city streets in the performance of various duties.

The use of speech in the exercise of these constitutional rights is not static, is not confined to peroration of ancient times. The inhabitant of this land, in his exercise of speech, is as much entitled to use modern-day inventions to augment his exercise of that right as he is in exercising his right of freedom of the press to use modern-day printing machinery. Amplifying devices are as much a part of effective exercise of modern-day speech over the radio and in public places as is paper or the printing press essential for effective exercise of freedom of press. Purely because sound-amplifying devices are relatively new and a departure from traditional practice is no reason for prohibiting their use for lawing purposes any more than would be justifiable the prohibition of use of the printing press because it was relatively modern.

In this day of airplane, jet propulsion, atomic bomb, streamlined trains and automobiles, to say nothing of radio, radar and other electronic developments, a loudspeaking apparatus is fast becoming or already has become a common convenience, if not a necessity, for the effective public speaker. Sound-amplifying devices used by speakers bear a

necessary relationship to freedom of speech and freedom of worship exercised by a preacher acting faithfully and seriously as an obedient servant of his Master (Isaiah 12:6; Matthew 10:27) and cannot be prohibited or censored.

In recent years, it has come to be recognized to all that the use of amplifying devices in radio broadcasting and in public speaking in public places such as auditoriums, halls and parks is a necessary and usual ancillary for effective free speech, speech that is intelligible. Without the use of such devices the right of free speech is definitely and seriously curtailed and impaired, if not frustrated entirely. Especially is this true in many cases where the speakers have weak voices. Accordingly, it can now be said that the use of sound devices is a necessary part of the effective exercise of freedom of speech. Therefore the right to interfere with the use of such amplifying devices is limited to the same rules of restraint and regulation as would apply to any restraint upon the exercise of freedom of speech itself. The mere fact that this is an amplifying device does not alone provide the city with new and extraordinary reasons for prohibiting and censoring the use of such device.

## D

**Freedom to be heard is as vital to freedom of speech as is freedom to circulate to freedom of press.**

These guaranteed rights are not exercised in a vacuum. They naturally and impliedly include the attraction of a crowd. The Court has recognized this with respect to the exercise of freedom of the press. In Ex parte *Jackson*, 96 U. S. 727, 733, the Court, in holding that regulations against the transportation in the mail of printed matter, which is open to examination, cannot be enforced so as to interfere in any manner with the freedom of the press, said:

"Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value."

The same principle applies here. A speech is delivered to an audience. The freedom to make a speech includes the freedom to be heard. The ordinance cannot be saved because it relates to the distribution of speech and not to the enunciation, for liberty of circulating is as essential to that freedom as liberty of speaking. Without the circulation, the enunciation would be of little value. Ex parte *Jackson*, 96 U. S. 727, 733; *Lovell* v. *Griffin*, 303 U. S. 444, 452.

## E

**Restricting the abridgment to the use of sound devices may not be justified on the ground that the right of free speech in the park without such auxiliary remains unimpaired.**

The trial court conceded that the freedoms of expression and assembly of appellant may have been prohibited, but justifies such prohibition on the ground that it leaves untouched his right to express his views orally without the aid of an amplifier. It is well established by a long line of decisions that the restriction of any basic civil right cannot be justified by the fact that other rights remain unimpaired and that the denial of a right in one manner, respect or place may not be warranted by the freedom to exercise that right in other ways, respects or places. See *Schneider* v. *New Jersey*, 308 U. S. 147, 163, where the Court declared: "But as we have said, . . . one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

## F

**The specious argument leading to a factitious conclusion that the use of sound devices results in forced audience abuse of free speech should be rejected.**

The Court here should not adopt a "forced audience" theory to support the decision below. Certainly there cannot be said to be more of an element of compulsion in the use of a sound amplifier in the exercise of freedom of expression and freedom of assembly than exists when literature is distributed in the exercise of freedom of the press and speech, whether by handing it to a person, leaving it on his doorstep, or sending it through the mails. Nor is there any greater compulsion than can be said to exist in canvassing, soliciting or making house-to-house calls for evangelical or political purposes. *Schneider* v. *New Jersey*, 308 U. S. 147; *Lovell* v. *Griffin*, 303 U. S. 444, *Cantwell* v. *Connecticut*, 310 U. S. 296; Ex parte *Jackson*, 96 U. S. 727. Those are just as much acts of compulsion in the same sense as the use of a sound amplifier.

However, the "forced audience" theory in such circumstances had been entirely vitiated by the decision of the Court in the case of *Martin* v. *Struthers*, 319 U. S. 141. There, appellant, one of Jehovah's witnesses, called at the homes of strangers, knocking on doors and ringing doorbells in order to distribute to the inmates leaflets advertising a public Bible discourse. The city ordinance forbade the summoning of inmates in that manner for that purpose. The Court held the ordinance to be a violation of the constitutional rights to free speech and press. Mr. Justice Black, speaking for the Court, said:

"For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meet-

ings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants. The question to be decided is whether the City, consistently with the federal Constitution's guarantee of free speech and press, possesses this power. . . . [¶] . . . This freedom embraces the right to distribute literature, *Lovell* v. *Griffin*, 303 U. S. 444, 452, and necessarily protects the right to receive it. The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets. *Schneider* v. *State*, 308 U. S. 147, 162. . . . [¶] . . . Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved." 319 U. S. at pp. 141-142, 143, 146-147.

The City of Lockport does not have the power to determine for all its inhabitants that they do not desire to have expressions of opinion enunciated over sound amplifiers. It must preserve for those who desire to exercise their freedoms of expression and assembly in that manner and for those who are willing listeners their rights so to do, just as it must preserve the right of a distributer of literature and of those willing to receive it. The first duty of the city is to preserve those constitutional privileges. Whatever inconvenience it causes the city, the city must find ways to regulate without invading constitutional rights.

The courts have gone far to protect the right of free speech together with the other basic civil rights from invasion in any degree, even to the extent of leaving them to the caprice of a licensing officer or an electorate. In the case of *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, the Court pointed out that one's right to

life, liberty and property, to free speech, free press, freedom of worship and assembly and other fundamental rights may not even be submitted to a vote and they depend on the outcome of no election. The Court carefully considered the law of the State of West Virginia compelling the flag salute by school children and further pointed out that those freedoms are susceptible of restriction only to prevent grave and immediate danger in which the State may lawfully act and that it is the purpose of the Fourteenth Amendment to the Federal Constitution to reserve those rights from all official control.

## G

**The ordinance does not regulate as to time, place and manner the use of sound devices ancillary to free speech and is therefore not within the police power of the City of Lockport.**

The only permissible limitation upon the exercise of free speech and concomitant freedoms may be said to be, at most, reasonable regulation as to time, place and manner. Ordinances prohibiting or censoring the exercise of these activities have been held uniformly to be unconstitutional. "Ordinances absolutely prohibiting the exercise of the right to disseminate information are, *a fortiori,* invalid." *Jones* v. *Opelika,* 316 U. S. 584, 595-596.

The ordinance in question cuts off entirely from the hearer the right to hear effectively a public speech in a public place. It deprives the speaker of the right to be heard intelligibly by his entire audience. It therefore abridges the rights of freedom of speech, communication and assembly. It certainly is not regulatory as to time, place or manner in which one may use a sound-amplifying device in the city. It does not purport to be a revenue-raising measure to bear any excessive police burdens resulting from the use of sound equipment.

It must be conceded that the public utterances of Je-

hovah's witnesses amplified in the interests of willing listeners come clearly within the category of free speech and assembly guaranteed by the United States Constitution.

In *Blue Island* v. *Kozul*, 379 Ill. 511, 51 N. E. 2d 515, a conviction under a city by-law or regulation providing for the procuring of a license and the payment of a fee was set aside. The City of Blue Island argued that its ordinance was not prohibitory. "It is contended by the city that this is a regulatory ordinance. A municipality may enact regulations in the interests of public safety, health, welfare or convenience, within the limits permitted by law, but in every case this power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe that freedom protected by the United States Constitution and by the Constitution of the State of Illinois. *Cantwell* v. *Connecticut, supra; Schneider* v. *Town of Irvington, supra.* The ordinance is not regulatory. As applied to the facts in this case, the ordinance makes no provision regulating the manner of carrying on the business of peddlers in the city of Blue Island."

The only limitation that is permitted by law upon the exercise of freedom of speech, freedom of press and freedom of worship is that a community may require a stranger to establish his identity and authority to represent his organization. While prohibition and censorship are condemned, this Court has said that laws regulating the exercise of freedom of speech, press and worship are permissible. However, the permissible limit or regulation rather than prohibition or censorship is stated by the Court as follows: "Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The State is likewise free to regulate the time and manner of solicitation generally, in the interests of public safety,

peace, comfort or convenience." *Cantwell* v. *Connecticut*, 310 U. S. 296, 306.

## H

**There is no showing that the use of the sound device in this case was an abuse of the right of free speech so as to present a clear and present danger to interests that the City of Lockport had the right to protect.**

The record is barren of any evidence whatsoever which establishes or from which it might be inferred that attention of passing motorists and pedestrians was so diverted as to create new traffic hazards or that appellant's acts on the occasion of his arrests had that effect. There are many things on the public highways and streets which may similarly divert the attention of motorists and pedestrians, for example, billboards, Burma-Shave signs, window displays, road repairs, airplanes, jet planes, etc. Even a pretty girl has been known to divert the attention of passing motorists. Yet no governing body or court would seriously contend that pretty girls should be barred from the parks, streets and highways. Nor that such other lawful activities could or should be banned for that reason.

There is no such showing here of any sufficiently imminent menace to the State itself or to the public welfare from the use of sound apparatus as to warrant either the legislative body or this court in determining that the use of such apparatus is not appropriate any place in the city of Lockport and for any purpose. Appellant's conduct was not said to involve a breach of the peace, commission of a nuisance, disturbance or impeding traffic. The utterances made over the loud speaker are not asserted to have been abusive, subversive or in any other respect unlawful.

## I

**The ordinance is presumptively unconstitutional because the State has failed to discharge the burden of proof imposed upon it in civil rights cases in prosecutions where the First Amendment is involved.**

Both appellee and the trial court lean upon the doctrine of the protection of public rights and the presumption of constitutionality as a refuge from the constitutional assault here made by appellant. The Police Court of Lockport concedes that the ordinance may deprive appellant of his freedoms of expression and assembly, but seeks to justify it on the basis of the rights of the public to at least a modicum of peace and quiet to which it is entitled.

It is submitted that when a regulation enacted under the police power of a municipality, whether on its face, as applied, or constructively, abridges, prohibits, or infringes upon any of the freedoms guaranteed by the First Amendment to the Constitution, such ordinance or regulation is presumptively invalid; and the burden falls upon the authority asserting the power under the regulation to prove by a preponderance of the evidence that the regulation is a valid exercise of the police power directed at some abuse of the constitutional rights which, unless prohibited or regulated, would constitute a clear and present danger to the health, safety or general security of the community as a whole. The showing of the abuse is a condition precedent to the exercise of the police power where such exercise or power has a tendency to censor, limit, infringe, restrict or prohibit any of the constitutional freedoms. The police power does not even exist in such cases unless there is a clear showing of the abuse. This rule is well stated by Chief Justice Hughes in *De Jonge* v. *Oregon*, 299 U. S. 353:

"The people through their Legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing

with the abuse. The rights themselves must not be curtailed. . . . Therein lies the security of the Republic, the very foundation of constitutional government."

The same rule was effectively supplied by the United States Court of Appeals for the District of Columbia in *Busey* v. *District of Columbia*, 78 App. D.C. 189, 138 F. 2d 592. Mr. Justice Edgerton, speaking for the court, said:

"Freedom of speech, press, and religion are entitled to a preferred constitutional position because they are 'of the very essence of a scheme of ordered liberty.' (*Palko* v. *Connecticut*, 302 U. S. 319, 325) They are essential not only to the persons or groups directly concerned but to the entire community. Our whole political and social system depends upon them. Any interference with them is not only an abuse but an obstacle to the correction of other abuses. (Civil liberties are at present relatively little threatened by governmental action, but in many communities the civil liberties of unpopular groups are greatly threatened by private terrorism. Legal recognition of these liberties tends to discourage this terrorism.) . . . [¶] We think we may hold that when legislation appears on its face to affect the use of speech, press, or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed; at least when their existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. The burden of proof in such a case should be upon those who deny that these freedoms are invaded. . . . [¶] . . . No presumption which lacks a probable basis in fact should be permitted to conceal an interference with essential freedoms."

The City of Lockport thus far has failed to show a *real* (as distinguished from imagined) clear and present danger

and has thus not discharged the heavy burden placed upon it where these precious civil rights are infringed.

No evidence was produced here and no showing made of the need for such an ordinance. Until the City has discharged this burden, by proving a clear and present danger of substantial evils to the community, it attempts to apply and enforce the ordinance cannot be sustained.

The Court in the 'labor organizer case' from Texas held that the clear and present danger test must be applied to abridgment of the liberties protected by the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516. In that case the Court said: "Choice on that border, now as always delicate, is perhaps more so, where the usual presumption supporting legislation is balanced by the preferred place given in our scheme of the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins*, 323 U. S. at pp. 529-530. See also *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639, *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153.

Judged by proper standards, it is clear that appellant's conduct, under the circumstances, did not and could not constitute any clear and present danger which would justify an application of the police power that curtails the personal liberties secured by the Federal and State Constitutions.

It is respectfully submitted that the provisions of the ordinance are presumed to be unconstitutional; that the burden falls upon the State to prove to the satisfaction of the Court that it is constitutional; that a clear and present danger to a substantial interest of the community has not been shown; and that the State has failed to sustain this burden and has not established that the ordinance is constitutional.

## J

**The police power of the State authorizing the prohibition and censorship of commercial pursuits and activities does not enter here.**

An ordinance regulating commercial pursuits and activities is one thing, but the application of regulations to conduct such as of appellant here, thereby interfering with his exercise of a constitutional right, is another. There is a difference in degree, which emphasizes the importance of protecting the individual from invasion of his constitutional liberties as distinguished from regulation of purely commercial enterprises. See *Schneider* v. *New Jersey,* 308 U. S. 147, where the Court (at page 163) made the differentiation as follows: "The ordinance is not limited to those who canvass for private profit; nor is it merely the common type of ordinance requiring some form of registration or license of hawkers, or peddlers. It is not a general ordinance to prohibit trespassing. It bans unlicensed communication of any views or the advocacy of any cause from door to door . . . " See also *Valentine* v. *Chrestensen,* 316 U. S. 52, 55; *Jamison* v. *Texas,* 318 U. S. 413, 417.

## K

**The ordinance is void because, on its face and as construed and applied, it prohibits the exercise of freedoms of speech, assembly and worship of Almighty God.**

The ordinance in question, in its broad sweep, prohibits speech entirely whether in a public or private place. It seeks to make no distinction as to times, places, purposes or the contents of the utterances which it forbids. It lays down a blanket ban on all outdoor speaking with a sound device, except in *some cases* when it *may be licensed* by the chief of police.

The ordinance here prohibits entirely the exercise of appellant's right of free speech. It can be seen from the decisions of the Court that the ordinance is absolutely prohibitory, in addition to its provisions for censorship.

In *Largent* v. *Texas*, 318 U. S. 418, the regulation under which one of Jehovah's witnesses was convicted required that she obtain a permit from the mayor before calling from door to door in the City of Paris, Texas. In unanimously declaring that the regulation was invalid and prohibitory rather than regulatory, the Court said: "Upon the merits, this appeal is governed by recent decisions of this Court involving ordinances which leave the granting or withholding of permits for the distribution of religious publications in the discretion of municipal officers. It is unnecessary to determine whether the distributions of the publications in question are sales or contributions. The mayor issues a permit only if after thorough investigation he 'deems it proper or advisable'. Dissemination of ideas depends upon the approval of the distributor by the official. This is administrative censorship in an extreme form. It abridges the freedom of religion, of the press and of speech guaranteed by the Fourteenth Amendment." 318 U. S. at p. 422.

In *Jamison* v. *Texas*, 318 U. S. 413, it was argued that because under the law of Texas the City of Dallas owned absolute title to the streets and had the dominion of the landlord under the law over the control thereof, the ordinance prohibiting the distribution of literature upon the streets was valid. That argument was rejected and the conviction of one of Jehovah's witnesses under the ordinance was set aside. The Court said: "They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote

the raising of funds for religious purposes." 318 U. S. at p. 417.

Assuming that the city has the right to reasonably regulate the use of the sound-amplifying device in circumstances like those here involved, as to time, place and manner, this ordinance is not such. It appears on its face to be prohibitory. It does not attempt, either explicitly or implicitly, to license or in any other way regulate or control the use of sound apparatus in the park in the exercise of free speech and the communication of information and views. The ordinance is so sweeping in its ban that it prevents in effect any public outdoor meeting for any purpose whatsoever. It absolutely and unequivocally prevents the communication of views and the exercise of free speech, for it is practically impossible to exercise those rights on public streets or in parks today and be heard without the use of sound amplifiers.

## L

**The ordinance is void because, on its face and as construed and applied, it licenses and censors the exercise of freedoms of speech, assembly and worship of Almighty God.**

This case falls squarely within the rule announced by this Court in *Hague* v. *C.I.O.*, 307 U. S. 496. Insofar as the ordinance provides for police censorship of the use of necessary and ancillary equipment in the exercise of freedom of speech, the case falls within the rule announced by this Court in *Jamison* v. *Texas*, 318 U. S. 413. The mere fact that the ordinance is directed to the use of such sound apparatus on the streets or public places of the City of Lockport does not save it from the constitutional prohibition. It rather serves to condemn it. In the case of *Hague* v. *C.I.O.*, the Court declared unconstitutional an ordinance of Jersey City which sought to license, through the Director

of Safety, public meetings in streets, parks and public places. In denouncing the ordinance, the Court held:

"Whenever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembling, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

"The privileges of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interests of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation be abridged or denied.

"We think the court below was right in holding the ordinance quoted in Note 1 void upon its face. It does not make comfort or convenience in the use of the streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right." 307 U. S. at pp. 515-516.

In *Schneider* v. *New Jersey*, 308 U. S. 147, the Court declared unconstitutional an ordinance of the Town of Irvington which prohibited canvassing, soliciting and distribution of circulars, or other matter, or calling from house to house in that town, without first having reported to and received a permit from the chief of police or other police officer. It was argued that the ordinance and regulation

involved were designed for the purpose of preserving the peace, prohibiting fraud and trespass, and to keep the streets clean and of good appearance. In making its decision, the Court held the ordinance not to be regulatory, but censorial and prohibitory and stated:

"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restrictions of enjoyment of these liberties.

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights. . . .

"As said in *Lovell* v. *City of Griffin, supra* [303 U. S. 444] pamphlets have proved most effective instruments in the dissemination of opinon. And perhaps the most effective way of bringing them to the notice of individuals in their distribution at the homes of the people. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the free and

unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees.

"Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of the citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press." *Schneider* v. *New Jersey,* 308 U. S. at pp. 161, 164.

In a subsequent decision, *Cantwell* v. *Connecticut,* 310 U. S. 296, a statute which prohibited solicitation without a permit of money or subscriptions for religious causes, was held to violate the freedom of speech guaranty as applied to one of Jehovah's witnesses who stopped two men on the street, set up a phonograph and played a record attacking a certain religious sect. It was contended that the law was enacted to regulate solicitations for the prevention of fraud and imposition. The Court said:

"*First.* We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty

embodied in that Amendment embraces the liberties guaranteed by the First Amendment. . . . In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. . . . ¶ . . . Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."

In *Thornhill* v. *Alabama*, 310 U. S. 88, the prohibitory statute there knocked down prevented picketing and going upon private premises. The petitioner picketed upon private premises. The picketing, upon the private premises of the Brown Wood Preserving Company, Inc., was contrary to its wishes, and in defiance of its commands to leave the property. In setting aside the conviction as being an abridgment of freedom of speech and press, the Court said:

"*First.* The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state. . . . Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations. *Schneider* v. *State*, 308 U. S. 147, 161, 162." 310 U. S. at pp. 95-96.

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**The decisions sustaining anti-noise ordinances, as applied to sound devices used in connection with public speech at assemblies, are not sound.**

The Police Court of Lockport relied upon the cases of *Cox* v. *New Hampshire,* 312 U. S. 569, and *Hamilton* v. *Montrose,* 109 Colo. 228, 124 P. 2d 757. [35] These cases are not analogous in fact or law to the case at bar. See also *Kovacs* v. *Cooper,* 315 N. J. L. 64, 50 A. 2d 451, aff'd December 30, 1947, by New Jersey Court of Errors and Appeals. Filed in this Court as No. 505, October Term, 1947.

In the *Hamilton* case the Supreme Court of Colorado rested its decision mainly on the facts produced by testimony of witnesses, which were found to show that the conduct of the defendant amounted to a breach of the peace and disturbed lawful occupants and property owners in the neighborhood. The court there specifically stated (109 Colo. at p. 237): "Applying, therefore, the same standards that were used in the *Cantwell* case [310 U. S. 296], we reach an opposite conclusion in the instant case from that announced in the *Cantwell* case because of the differing facts."

There was no evidence of that type produced in the case *sub judice,* no similar factual situation, and no finding of facts upon which either of the courts below could base the decision.

The decisions of the courts below and that of the Colorado Supreme Court in *Hamilton* v. *Montrose,* are ably analyzed in the clear and cogent dissent of Mr. Justice Otto Bock in the *Hamilton* case. The dissenting opinion differed with both the findings of fact and conclusions of law and declared (109 Colo. at p. 239):

"The constitutional questions raised are of more importance. Within the last decade the Supreme Court of the United States, under the able leadership of the then

Chief Justice Charles Evans Hughes, showed in an affirmative way how the civil liberties of the individual may be vindicated and preserved. Practically all of the cases cited in the majority opinion indicate this definite trend. What freedom of speech, the press, and exercise of religion actually mean can be determined only when these principles are tested in specific instances. The tendency now is not to widen the conflict between liberty and authority, but to reconcile the relationship between these governmental principles. Would a statute or ordinance which absolutely prohibits the use of any loud-speaking device under any circumstances be an abridgment of free speech? I say it certainly would. Just as the right of free press includes the right to 'distribute', so freedom of speech includes the right to be 'heard'. The use of a loud-speaker, under the circumstances, is not a nuisance per se. . . . A loud-speaking device is a great convenience to those who desire to hear and be heard, and bears a necessary relationship to freedom of speech. Its use may reasonably be regulated as to time, place and manner. *Cantwell* v. *Conn.*, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A. L. R. 1352. . . . Concepts of civil liberty, such as freedom of speech and the press, are relative and not absolute, and vary with time and circumstances; and so, amplification devices, in recent years, have gone largely into use, and have their necessary rights. That a city may regulate the use of such sounding devices and protect itself 'from concentrated and continuous cacophony' already has been indicated above. The inertia which sometimes exists in municipalities in protecting individual liberty must be overcome by affirmative action in the enactment of laws that will not abridge, but reconcile, the exercise of free speech and religion, with the authority to reasonably regulate it in the interest of the public safety, health, welfare or convenience . . .

"The majority of the court here relies on the case of *Cox* v. *New Hampshire,* 312 U. S. 569, 61 S. Ct. 762, 764,

85 L. Ed. 1049, 133 A. L. R. 1396, to justify its opinion. In that case the sole charge against appellants was that they were 'taking part in a parade or procession' on public streets without a permit as the statute required. In referring to that case in *Trojello* v. *Walenburg,* 198 Colo. 427, 118 P. 2d 1081, we said that it contained an excellent statement of the power of a municipality to impose regulations in the use of public streets." *Hamilton* v. *Montrose,* 109 Colo. 228, 239-240, 242.

As was shown by Mr. Justice Bock, *Cox* v. *New Hampshire,* 312 U. S. 569, is not in point and does not support the conclusion reached by either the Colorado court or the courts below here.

The ordinances involved in the *Hamilton* case and in this case have been erroneously compared with and simulated to the New Hampshire statute involved in the *Cox* case. It should be remembered that the New Hampshire Supreme Court found that the statute in the *Cox* case, as construed by the court, was a regulatory measure as to time and place. It was a revenue-raising measure to provide for policing of parades and placing a portion of the burden of expense of managing the city's traffic during a parade upon the holders of the parade. The statute in the *Cox* case did not attempt to prohibit or censor. The ordinance in this case both prohibits and censors.

In *Brachey* v. *Maupin,* 277 Ky. 467, 126 S. W. 2d 881 and *Maupin* v. *Louisville,* 284 Ky. 195, 144 S. W. 2d 237, the ordinances involved did not entirely prohibit the use of sound trucks, but rather attempted to regulate their use. In the former case, the attempted regulation was through designating certain areas comprising 5% of the city through which sound trucks could not be operated, letting free the remaining 95% and fixing certain hours for such operation. In the latter case, the regulation was through a license of sound trucks by the chief of police. We do not pass judgment on whether such regulations were reasonable and

proper, but merely point to the fact that those ordinances were not entirely prohibitory as is the one here questioned.

As a matter of fact, the Court of Appeals of Kentucky, in *Brachey* v. *Maupin*, pointed out that the Kentucky courts had previously stricken out two ordinances, one passed in 1931 and the other in 1935, which were entirely prohibitory and not regulatory and stated (277 Ky. at p. 472):

"We are unable to agree that the former ordinances and the one presently involved are of the same character and kind. It is our view that they are radically different. The former two ordinances sought to entirely prohibit the operation of a sound truck in the City of Louisville at any time or place, whereas the amendatory ordinance here involved is not so broad in its scope and seeks to regulate rather than prohibit."

The Lockport ordinance does not reach speech, over a sound device, which is obscene, offensive to public morals or advocates unlawful conduct. Nor does it make comfort or convenience in the use of streets or parks the standard of official action. It is comprehensive in its ban of the use of sound apparatus and forbids it for any and every purpose unless the chief of police can be inveigled into granting a permit. There is no restriction in its application with respect to time and place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants or the misuse or obstruction of the streets or parks. It prohibits or entirely licenses or censors, in effect, the use of a device which is a great convenience to those who desire to hear and be heard and has a necessary relationship to the exercise of freedom of speech and assembly.

Although the rights previously enumerated are not absolute, and the State in the exercise of its police power may punish the abuse of these freedoms, it cannot under the guise of regulation abridge or infringe upon them.

## Conclusion

The terms of the ordinance providing for prohibition and censorship are identical to the censorship and prohibitory provisions of other ordinances invalidated by former decisions of this Court. No distinction can be made between the condemned provisions of this ordinance and the ordinances involved in the former decisions of the Court because there is involved the use of a sound device. The use of a sound device ancillary to exercise of free speech at an assembly is not *per se* an abuse of free speech. The limit of the police power is to deal with the abuse. Possibility of abuse can not be avoided by prohibiting or censoring the use of the device. *De Jonge* v. *Oregon*, 299 U. S. 353 (1937); *Schneider* v. *New Jersey*, 308 U. S. 147 (1939).

Because the sound device is a modern-day invention not known to speakers of ancient times does not withdraw its use from the shield of the Constitution. The Constitution is a living document that is fully capable of coping with the vicissitudes of life and the times through new applications. The printed leaflets or pamphlets cannot be censored or prohibited because their wider distribution through the rotary press has made them noxious to many people. By force of the same reason the amplification of the human voice in speech before an assembly is no ground for the denial by law of use of sound devices.

The ordinance on its face, and as construed and applied by the courts below, does not purport to be a regulatory law. No attempt is made by the ordinance or the authorities enforcing it to regulate the volume of sound, the time of use, the manner, the place or the number of sound devices that may be used. The face of the ordinance and the record as to its application and enforcement shows indisputably that it is a prohibitory ordinance with a proviso for censorship by the Chief of Police. The fact that it censors and prohibits an adjunct to free speech which is necessary in order to

make it effective rather than prohibit and censors the entire right of speech altogether does not save it. The Constitution prohibits abridgment. Its restraints are not confined to mere prohibition or censorship of the entire right. Anything which shortens, burdens or curtails the right of free speech is prohibited by the Constitution. It should be apparent to all that the denial of the use of the sound device is an abridgment and curtailment of the effective full right of free speech to an assembly.

There being an abridgment of the right of free speech at the assembly of the persons in Outwater Park in Lockport by the arrest, prosecution and conviction of the appellant because of his use on the four consecutive Sundays in question the sound device it is necessary to set the convictions aside.

WHEREFORE it is respectfully submitted that the judgments of the courts below should be reversed, the convictions set aside and the prosecutions ordered dismissed.

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